**IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH**

**CRA-S-828-SB-2005**
**Date of decision : 20.05.2014**

Dara Singh

... Appellant

Versus

The State of Punjab

... Respondent

***CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL***

Present: Mr.P.S.Sekhon, Advocate
for the appellant.

Mr.Neeraj Sharma, AAG, Punjab.

***REKHA MITTAL, J.(ORAL)***

The present appeal has been directed against the judgment of conviction and order of sentence dated 11.04.2005 passed by the Judge, Special Court, Patiala whereby Dara Singh appellant has been convicted and sentenced for commission of offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985(for brevity "the Act"), detailed hereinbelow:-

| **Name of Convict** | **Under Section** | **Sentence (R.I.)** | **Fine(in ₹)** | **In Default (R.I.)** |
|---|---|---|---|---|
| Dara Singh | 15(c) N.D.P.S. Act | 10 years | 1 lac | 1 ½ years |

The brief facts of the case are that on 21.11.2003, SI Karmit Singh of CIA Staff, Nabha along with a police party was present at bus stand Dhingi in connection with checking of bad elements. Chhaju Khan, a

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public witness came and joined in the police party. Secret information was received that Dara Singh accused is indulging in sale of poppy husk and he has kept the suspect material in a room constructed in his plot in the area of village Sandhoheri and if a raid is conducted, he can be apprehended with the contraband. The police party reached the disclosed place and found the accused present in his plot. He was apprised of his right of being searched in the presence of a gazetted officer or a Magistrate but he reposed confidence in the Investigating Officer (in short "I.O."). On search of two bags, poppy husk was recovered from each of the bags, two samples of 25 grams each from each bag were separated and converted into parcels. The residue weighing 39.950 kgs in one bag and 19.950 kgs in another bag were sealed in separate parcels with seal bearing impression KS. Seal after use was handed over to Chajju Khan. Sample seal impression was also prepared. The case property was taken into police possession through seizure memo. Ruqa was sent to the police station and on its basis, formal FIR was registered. Site plan of the place of recovery was prepared and statements of witnesses were recorded. Intimation memo regarding arrest of accused was also prepared. On return to the police station, the case property along with the accused and PWs were produced before the Station House Officer, Harbhajan Singh. He verified the case property and put his seal bearing impression HS on the case property as well as sample seal chit. The case property was deposited with MHC Surinder Singh.

On 22.11.2003, ASI Karmit Singh produced the accused and the case property before the Illaqa Magistrate. The Magistrate found the seals intact on the case property and thereafter photographs of the case

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property were taken and it was redeposited with the MHC. Two parcels of samples were sent to the office of Chemical Examiner, Patiala for analysis. On receipt of report of the Chemical Examiner and completion of investigation, challan was presented in the Court.

After necessary compliance with the provisions of Section 207 of the Code of Criminal Procedure (in short 'the Code') and having heard counsel for the parties, charge under Section 15 of the Act was framed against the accused to which he pleaded not guilty and claimed trial.

To prove it case, the prosecution examined HC Surinder Singh PW1, SHO/Inspector Harbhajan Singh PW2, Constable Resham Singh PW3, SI Karmit Singh, I.O. PW4, Upinder Kaushal PW5, SI Ranjit Singh PW6 and ASI Shashi Kapoor PW7.

On evidence of the prosecution being closed, statement of the accused in terms of Section 313 of the Code was recorded through which he denied the incriminating circumstances put to him and raised the plea of his innocence and false implication. He examined Hardev Singh DW1 in his defence.

The learned trial Court, on appreciation of evidence adduced by the prosecution and after hearing counsel for the parties came to hold that the prosecution has successfully proved the charge against the accused for committing offence of keeping 60 kgs of poppy husk in his possession without any permit and accordingly, he was convicted and sentenced for the offence.

Feeling aggrieved by the verdict of the learned trial Court, the present appeal has been preferred by Dara Singh (convict) which was

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admitted on May 06, 2005 and has now matured for hearing. During pendency of the appeal, the substantive sentence awarded to the appellant was ordered to be suspended.

Counsel for the appellant submits that the learned trial Court overlooked the lacunae, loopholes and discrepancies, in the case of prosecution while holding the accused guilty of committing the offence charged against him. To bring home his contention, he has assailed the prosecution case on several counts.

The first submission made by counsel is that Chhaju Khan, a witness from the public purported to have joined during investigation, has not been examined. No witness from the vicinity of the alleged place of recovery was associated in compliance with provisions of Section 100(4) of the Code despite the fact that the said place was surrounded by residential houses.

It is argued with vehemence that the alleged recovery was effected from the accused in pursuance of secret information received by the I.O. The prosecution failed to comply with the provisions of Section 42 of the Act, mandatory in nature and the accused is entitled to acquittal on this score alone.

The I.O. also failed to comply with the provisions of Section 55 of the Act as no special report was sent to the superior officers in compliance thereof. Further dilating, it is argued that in the absence of copy of special report being part of challan presented under Section 173 of the Code and a reference of sending special report in the police zimnies recorded by the I.O., the prosecution cannot take advantage of a copy of

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special report allegedly available on the police file.

Another submission made by counsel is that there is delay of 6 days in sending the samples without any explanation for the same, therefore, the benefit of delay would go to the accused. Form No.29 was not filled on the spot and it was filled after 6 days by a person other than the I.O.

Counsel would argue that the prosecution has failed to provide registration particulars of the private Zipsy or its owner in which the police party came to the spot. There is no evidence collected with regard to ownership of the house from where the alleged recovery was effected. The place of recovery was, admittedly, did not have a door, therefore, lying open and accessible to the public at large and in these circumstances, the alleged recovery cannot be connected with the accused.

Counsel for the State has supported the judgment passed by the learned trial Court with the submission that there is no factual or legal infirmity in the case of the prosecution or judgment passed by the learned trial Court. It is further submitted that the presumptions under Sections 35 & 54 of the Act are available in favour of the prosecution and the trial Court has rightly held that the accused was found in conscious possession of contraband without any permit / licence. No reasons much less tangible are forthcoming to falsely indict the accused in the crime, therefore, any minor contradictions or discrepancies in the case of prosecution cannot overweigh the reliable and credible evidence on record. The accused cannot derive any advantage to his contentions from the testimony of defence witness Hardev Singh as he never expressed any grievance or submitted any representation to the higher authorities in regard to false implication of the accused despite

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gaining knowledge of registration of FIR on the day it was lodged in the police station. The last submission made by counsel is that there is substantial compliance with the mandatory provisions of Section 42 of the Act and the provisions of Section 55 are merely directory in nature.

I have heard counsel for the parties and perused the records.

Chajju Khan, a member from the public was associated with the police party before conducting raid at the house of the accused. Chajju Khan was given up by the prosecution having been won over by the accused. Firstly, the Court cannot turn a blind eye to the fact that people from public are generally reluctant to associate during police proceedings, may be, due to fear of animosity with the accused or harassment during trial. It is invariably seen that if a person joins recovery proceedings, he does not come forward to support the cause of the prosecution for the aforesaid reason. This apart, the prosecution is not obliged to examine a witness who has been won over by the accused and likely to turn hostile in case examined before the Court. It is always open to the accused to examine such a witness during his defence but it has not been so done in the present case. Reference in this context can be made to the judgment of the Hon'ble Supreme Court of India in ***Masalti Vs. State of U.P., AIR 1965 SC 202*** and ***Rohtash Kumar Vs. State of Haryana 2013(3) RCR (Criminal) 355.*** In ***Masalti's*** case (supra), the Court held that it would be unsound to lay down as a general rule, that every witness must be examined, even though, the evidence provided by such witness may not be very material, or even if it is a known fact that the said witness has either been won over or terrorised. In such cases, it is always open to the defence to examine such witnesses as

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their own witnesses, and the court itself may also call upon such a witness in the interest of justice. In this view of the matter, the accused cannot gain any advantage to his contention from non-examination of Chajju Khan.

Indisputably, no witness residing in the neighbourhood of the alleged place of recovery was associated despite the fact that the police conducted the raid on the basis of secret information. As has been noticed earlier, public men generally express reluctance to join police proceedings more particularly in the circumstances when a person living in their neighbourhood is booked in a crime. However, the evidence of official witnesses, if found reliable and trustworthy, cannot be discarded and disbelieved for want of corroboration by a witness from the public more particularly in the circumstances that the accused has not alleged any hostility against him by the members of the raiding party. The contention raised by learned counsel in regard to non-examination of Chajju Khan or non-association of a person from the neighbourhood of the accused, in these circumstances, does not carry much weight to become a ground for reversal of the judgment passed by the learned trial Court.

Much stress has been laid by counsel that the prosecution has failed to comply with mandatory provisions of Section 42 of the Act. In support of his contention, he has also relied upon the judgment of the Hon'ble Supreme Court of India in ***Beckodan Abdul Rahiman Vs. State of Kerala, 2002(2) RCR (Criminal) 385.*** In the referred authority, there is reference to unamended provisions of Section 42 of the Act, according to which, under Section 42(2) of the Act, where an officer takes down any information in writing under sub-section (1) or records grounds for his

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belief under the proviso thereto he shall forthwith send a copy thereof to his immediate official superior. By way of amending Act of 2001, the word "forthwith" has been amended and it is provided that information is required to be sent to the superior officer within 72 hours. This apart, the judgment in ***Beckodan Abdul Rahiman's*** case (supra) cited by counsel for the appellant makes reference to the earlier judgment of the Hon'ble Supreme Court in ***State of Punjab Vs. Balbir Singh, 1994(1) RCR(Crl.) 734*** and ***Saiyad Mohd. Saiyad Umar Saiyad & Ors. Vs. State of Gujarat, 1995(2)RCR (Crl.) 388*** wherein it was held that if there is a total non-compliance of the provisions the same affects the prosecution case. To that extent it is mandatory.

In ***Bahadur Singh Vs. State of Haryana, (2010) 4 Supreme Court Cases 445,*** the Supreme Court while dealing with implications of Section 42 of the Act held that sending a wireless message to the Deputy Superintendent of Police, Kurukshetra, immediate higher officer of the I.O. and ruqa containing all the facts and circumstances of the case being sent to the Police Station from the spot subsequent to the recovery of contraband is a substantial compliance with the provisions of Section 42 of the Act and no prejudice was shown to have been caused to the accused on account of non-reduction of secret information into writing and non-sending of the same to the higher officer immediately thereafter. It was further held that apart from the decision in ***Sajan Abraham Vs. State of Kerala, (2001) 6 SCC 692,*** the decision of the Constitution Bench in ***Karnail Singh Vs. State of Haryana (2009) 8 SCC 539*** has also made it clear that non-compliance with the provisions of Section 42 may not vitiate the trial if it did not cause any

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prejudice to the accused. Furthermore, whether there is adequate compliance with Section 42 or not is a question of fact to be decided in each case.

Now reverting to the case in hand, the I.O.was not present in the Police Station rather was present at bus stand Dhingi in connection with checking of bad elements when he received secret information that the accused was indulging in trade of poppy husk and could be nabbed if a raid was conducted. Without any loss of time, raid was conducted on the spot leading to recovery of 60 kgs of poppy husk. Immediately after effecting recovery, ruqa was sent to the Police Station giving all the facts and circumstances on the basis whereof Sub Inspector Ranjit Singh registered the FIR. A copy of the First Information Report was received by the Illaqa Magistrate on 21.11.2003 at 7.45 PM i.e. within 3 / 4 hours of recovery from the accused. As the Illaqa Magistrate received information regarding recovery of contraband from the accused within a period less than 72 hours from the time of recovery, it is difficult to accept the contention of the appellant that the I.O.failed to comply with the provisions of Section 42 the Act. Even otherwise, counsel for the appellant has not advanced any arguments as to what prejudice has been caused to the accused for non-compliance of the provisions of Section 42 in extenso. The contention raised by counsel in regard to non-compliance with the provisions of Section 42 of the Act is untenable and merits rejection.

The submission made by counsel in regard to delay of 6 days in sending the sample is also devoid of merit and is accordingly rejected. The prosecution has led sufficient evidence on record that no link evidence is missing in the case. The case property, on arrival to the Police Station was

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produced before the SHO Harbhajan Singh, who verified the investigation and sealed the case property with his seal bearing impression 'HS'. On the next day i.e. 22.11.2003, the case property along with the accused was produced before the Illaqa Magistrate and the Illaqa Magistrate passed an order by way of endorsement on application Ex.P1 that the case property was seen, signed, verified and photographs being taken in his presence and inventory being certified. As per the report of Chemical Analysis, the seals bearing impressions 'HS' and 'KS' were found to be intact and tallied with the specimen seals. In this regard, reference can be made to the judgments of the Hon'ble Supreme Court in ***Balbir Kaur Vs. State of Punjab, 2009(3) RCR (Criminal) 580*** and ***Jarnail Singh Vs. State of Punjab, 2011(3) SCC 521.*** In ***Balbir Kaur's*** case (supra), the Hon'ble Court held that as far as the delay in sending the samples is concerned, we find the said contention untenable in law. Reference in this regard may be made to the decision of this Court in Hardip Singh's case wherein there was a gap of 40 days between seizure and sending the sample to the chemical examiner. Despite the said fact, the Court held that in view of cogent evidence that opium was seized from the appellant and the seals put on the sample were intact till it was handed over to the chemical examiner, delay itself is not fatal to the prosecution case.

Counsel also made a vain attempt to attack prosecution case for failure to disclose the registration particulars and owner of the Zipsy used by the police party as well as there being no evidence in respect of ownership of the room / house from where the recovery was effected and further the said room being accessible to others.

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There is no such requirement of law that the I.O.must give the particulars of conveyance used for reaching the place of recovery. In the case at hand, the recovery was effected in November, 2003 but the I.O.was examined in October, 2004 and ASI Shashi Kapoor, a marginal witness to the recovery was examined in February, 2005. In the absence of reference to the registration particulars of the vehicle in the police zimnies, it is extremely difficult for the I.O. to reveal those particulars during examination before the Court. So far as there being no documentary evidence with regard to ownership of the place from where the recovery was effected, during cross-examination of SI Karmit Singh and ASI Shashi Kapoor, there is no challenge to the testimony of the witnesses that the accused was found present in his house where there was one room constructed in a plot. It has also come on record that the accused owns two houses in the village and his other house is at some distance from the house in which the contraband was lying. Another plea of the accused that the room did not have a door, therefore, accessible to the public is also untenable because the accused was found present at the spot and the recovery was effected from the room constructed in the plot. The matter would have been different had the recovery been effected in the absence of the accused because in that eventuality the accused could raise a plea that he was not aware of any contraband being lying in the room. In view of the above, the accused is not entitled to get any advantage of the alleged discrepancies.

No other point has been raised before the Court.

In view of what has been discussed hereinabove, finding no

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merit, the appeal is dismissed. The appellant is on bail during pendency of appeal. He be taken in custody to suffer the remaining sentence.

**(REKHA MITTAL)**
**JUDGE**

**May 20, 2014.**
*Davinder Kumar*

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